U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue date: 11Jul2002

CASE NUMBER: 2001-LHC-2135

OWCP NO.: 07-143335

IN THE MATTER OF

BILLY D. STANLEY,
Claimant

v.

TCB INDUSTRIES, INC.,
Employer

and

LEGION INSURANCE CO.,
Carrier

APPEARANCES:

Lionel H. Sutton, Esq.
On behalf of Claimant

Collins Rossi, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Billy Stanley (Claimant) against TCB Industries, Inc. (Employer), and Legion Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on March 14, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twelve exhibits, which were admitted, including: payroll records; medical records from Drs. Schumacher, and Vogel; a functional capacity evaluation; a memorandum from the informal conference; the deposition of TCB Industries Representative Janice Craig; and correspondence from FARA Healthcare Management.[1] Employer introduced eleven exhibits, which were admitted including: Department of Labor filings; vocational records of FARA Healthcare Management; a Section 8(i) settlement agreement; Claimant's tax returns; Claimant's wage records; and a functional capacity evaluation.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of injury was February 12, 1997;

2. The injury occurred in the course and scope of employment, and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the injury on February 12, 1997;

4. No Notice of Controversion was filed;

5. An informal conference was held on March 10, 1999, and on April 4, 2001; and,

6. Employer paid wage benefits of $200.27 per week from February 24, 1997, to February 4, 2001, and paid $60.00 per week from February 4, 2001 to the present. All medical benefits were paid except for Claimant's February 10, 1999 surgery, the authorization for which was denied even though that surgery was both reasonable and necessary.

II. ISSUES

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

The following unresolved issues were presented by the parties:

1. Average weekly wage;

2. Payment of medical expenses; and,

3. Residual wage earning capacity.

III. STATEMENT OF THE CASE

A. Chronology

Prior to working for Employer, Claimant worked as an iron worker at different locations in Tennessee, Arkansas and Louisiana for various paper mills earning about fifteen dollars an hour, a job that entailed climbing ladders, hooking, and bolting iron together. (Tr. 31-32; EX 6, p. 21). During the last week in October 1996, Employer hired Claimant as a rigger to work on offshore platforms. The job entailed:

> Climb chain falls and chokers and stuff like that. Climbed up like at the top of a rig up under. Pipe racks, hooking chokers to the pipe racks. Hook your come-alongs or your chain falls up above it and hook all that up. You have to tote all that up there. Hook it up and let it down, all that, let it down, go get it and - -

(Tr. 34).

When Claimant first began to work for Employer, his jobs were sporadic. (Tr. 35). Driving from northern Louisiana, Claimant told Employer that he needed something more permanent because he couldn't continue to make the long drive when he wasn't being called out for any jobs on arrival. (Tr. 35). Accommodating Claimant's desire to work, Employer assigned Claimant a rigging and maintenance job on a platform owned by Freeport McMoran. (Tr. 35). That job required Claimant to work fourteen days on the rig and then he would have the next seven days off. (Tr. 35-36). Although Claimant was not hired for a specific duration, Employer had a five year contract on the Freeport platform. (Tr. 36). On a typical

day Claimant would work 6:00 a.m. to 6:00 p.m., was paid eight dollars an hour and worked no less than eighty-four hours per week. (Tr. 37).

Claimant was injured on the outer continental shelf on February 12, 1997, when he was assisting in a shut-down operation on an outlying platform. (Tr. 38-40; EX 2, p. 1). Part of the shut-down operation required Claimant to remove a long and heavy ladder without the assistance of a

crane. (Tr. 40). While carrying the ladder with two other employees, Claimant stepped on a hose and twisted his back. (Tr. 40-41; EX 1, p. 1). Due to rough sea conditions, Claimant could not take the boat back to the Freeport McMoran platform, but he was transported by helicopter. (Tr. 42).

On September 3, 1997, after conservative treatment, Claimant's treating physician, Dr. Vogel, recommended surgical intervention in the nature of a left side L4-5 discetomy with lateral recessed decompression, and if problems were discovered at L5-S1 then a discetomy at that level would also be necessary. (CX 5, p. 3). On October 14, 1997, Claimant was admitted to Memorial Medical Center and a micro-surgical laminectomy at L4-5 and L5-S1 was performed with left medical branch neurotomy at L3-4, L4-5 and L5-S1. *Id*. at 28-30. Employer/Carrier paid for this operation. (Tr. 43-44).

Three months post-operation, Dr. Vogel opined that Claimant had incurred a permanent impairment rating of ten to fifteen percent and would be unable to lift, push or pull greater than fifty pounds or do repetitive bending. (CX 5, p. 38). Maximum medical improvement was assigned as one-year post-operation. *Id*. Subsequently, two discs collapsed, and Claimant developed further back problems including: a herniated lumbar disc, symptomatic lumbar degenerative disc disease, and lumbar instability, which prompted Dr. Vogel to recommend a second surgery to perform: a posterior lumbar inter-body caged fusion at L4-5, L5-S1, a bilateral micro-surgical discetomy at L4-5, L5-S1, and bilateral medial branch neurotomy at L3-4, L4-5, and L5-S1. (Tr. 44; EX 5, p. 39-42).

Dr. Schumacher issued a second opinion on the propriety a second surgery and after reviewing diagnostic studies performed during March and April 1998, he opined that there was no evidence of recurrent disc herniation and that Claimant was engaging in symptom magnification. (CX 2, p. 3). After a radiologist found evidence of a ruptured lumbar disc on July 7, 1998, however, Dr. Schumacher recommended decompression and discetomy without fusion. *Id*. at 5-6.

On August, 7, 1998, Mr. Nebe, a vocational counselor with FARA Healthcare Management, performed a vocational assessment based on the medical records of the treating physician, Dr. Vogel, the second opinion physician, Dr. Schumacher, and Mr. Nebe's vocational interview with Claimant. (EX 6, p. 20). At that time, Dr. Vogel had issued a report indicating that Claimant had reached maximum medical improvement with permanent restrictions of no lifting, bending, pulling of pushing greater than fifty pounds and no repetitive bending. *Id*. Subject to those restrictions, Dr. Vogel approved Claimant's return to his former position as a rigger. *Id*. Contrary to Dr. Vogel's recommendations, Dr. Schumacher opined that Claimant was only capable of light duty employment. *Id*. Based on Claimant's "transferable skills," Mr. Nebe identified career alternatives such as a boat rigger, service mechanic, oiler, lube technician, boat outfitter, lawn sprinkler installer, bridge operator and forklift operator. *Id*. at 22-23. Other entry level positions falling between light and medium level work that Mr. Nebe considered were: hot shot driver, parts delivery driver, parts clerk, inside sales person, van driver, rental car delivery driver, and a porter/janitor. *Id*. at 23. No labor market survey was ever performed to determine the availability of these jobs. *Id*.

On February 10, 1999, Claimant was admitted to Memorial Medical Center to undergo Dr.

Vogel's recommended procedure. (CX 5, p. 41). Employer/Carrier refused to pay for this second operation despite the fact that it was recommended by Claimant's treating physician and despite the fact that Dr. Schumacher also recommended a form of surgery. (Tr. 43-44). To pay for the procedure, Claimant's attorney forwarded a $4,000.00 deposit to Dr. Vogel and the balance remains outstanding. (Tr. 45; CX 6; CX 7).

On June 1, 1999, Dr. Vogel opined that Claimant would have incurred a fifteen to twenty percent permanent impairment and would be unable to lift, push or pull greater than thirty-five pounds or bend repetitively. (CX 5, p. 56). Maximum medical improvement would be reached two years after the operation. *Id*. at 57. On November 16, 1999, Dr. Vogel reiterated that Claimant was currently disabled for employment and had not reached maximum medical improvement. *Id*. at 69. On February 25, 2000, Dr. Vogel reiterated his position in response to requests from Mr. Nebe, a vocational counselor, stating that Claimant was currently disabled due to intractable pain. (CX 11, p. 4). Dr. Vogel further stated that when Claimant was able to control between eighty and ninety percent of his pain, he would be capable to undergoing a functional capacity evaluation to determine his ability for gainful employment. *Id*.

On March 20, 2000, Mr. Nebe forwarded the following job leads to Claimant: Alarm Monitor in Monroe, Louisiana; Security Guard in Shreveport Louisiana; Monitor for the Salvation Army in Monroe, Louisiana; Lot Attendant in Vicksburg, Mississippi; and Transport Drive in Vicksburg, Mississippi. (EX 6, p. 36-37). On May 23, 2000, Mr. Nebe submitted several job descriptions to Dr. Schumacher for approval. (EX 6, p. 27).

On May 11, 2000, Claimant and Employer entered into a Section 8(i) settlement settling the claim for future medical expenses and there was an agreement that past medical benefits (other than for Claimant's second surgery, had been paid. (Tr. 6; EX 7).

On June 16, 2000, Dr. Schumacher noted that Claimant underwent a caged fusion on February 11, 1999 and that Claimant was still suffering from recurrent pain. (CX 3, p. 1-2). Dr. Schumacher's impression was that Claimant suffered from status post-operative lumbar laminectomy with inter-body caged fusion and a failed back syndrome. *Id*. at 2. Dr. Schumacher further opined that Claimant was disabled for any but the most sedentary of activities and may not even be able to perform those due to chronic pain and lack of communication skills. *Id*. Overall, Dr. Schumacher stated that he is likely permanently and totally disabled for any and all occupations , but from a physical standpoint, Claimant was capable of activities requiring repetitive lifting, bending, pulling and pushing of weights less than fifteen pounds, but that restriction did not take into account Claimant's reports of chronic pain which would prohibit Claimant from performing any work. *Id*. No assertion could be made concerning maximum medical improvement as it take at least a year for a fusion to become solid. *Id*. at 3. Of the available jobs Mr. Nebe forwarded to him, Dr. Schumacher indicated that none may be appropriate due to Claimant's chronic pain. *Id*. Nonetheless, Dr. Schumacher indicated that a position as an alarm signal operator, auto service writer, counter clerk, and telephone solicitor were appropriate vocational undertakings, but a position entitled "Apartment Make Ready" was not appropriate. (EX 6, p. 29-33).

On July 5, 2000, Mr, Nebe forwarded more job leads to Claimant including: Route Carrier for the News Star in Monroe, Louisiana, Delivery Diver in Monroe, Louisiana; Monitor for the Salvation Army in Monroe, Louisiana; Driver in Monroe, Louisiana; and a Meter Reader in Monroe, Louisiana. (EX 6, p. 41-42).

On August 17, 2000, Claimant underwent a functional capacity evaluation with Mr. Paul Procell. (EX 10). Claimant reported constant pain in his lumbar region with radicular pain extending down his left foot, as well as paresthesias and burning sensations in the left lower extremity. *Id.* at 2. Claimant's self-described limitations was that he could sit or stand for one hour before needing to alternate positions. *Id*. On a zero to ten scale Claimant rated his pain score between six and ten. *Id*. Mr. Procell related that Claimant provided maximum voluntary effort and borderline appropriate pain behavior during the exam. *Id*. at 3. Although Claimant self-limited his performance due to increased pain, Claimant did not meet objective criteria for symptom exaggeration. *Id*. During the exam, Claimant demonstrated an ability to lift twenty-one pounds occasionally from floor to shoulder, and the ability to carry sixteen pounds in a bilateral frontal carry. *Id*. at 4. Based on the results of the examination, Mr. Procell opined that Claimant was capable of light duty work that did not require continuous standing and walking activities greater than one hour. *Id*.

On August 28, 2000, Mr. Nebe wrote to the functional capacity evaluator, Paul Procell, regarding issues with the functional capacity evaluation. (EX 6, p. 34). Mr. Nebe was concerned that the functional capacity evaluation was not an accurate reflection of Claimant's ability to work based on indications of inappropriate pain levels, inconsistent effort, positive Waddell signs and inappropriate responses during the testing. *Id*. Mr. Nebe thought that Claimant would be capable of at least light duty work after weighing the sub-maximal effort. *Id*. Also, Mr. Nebe questioned a recommendation Mr. Procell made for pain management considering that Claimant was not a motivated individual. *Id*. Finally Mr. Nebe stated that Mr. Procell should have called him prior to the evaluation so that Mr. Nebe could provide a "more clear picture" of Claimant. *Id*.

On October 9, 2001, Mr. Nebe wrote to Dr. Vogel to ascertain whether Claimant's restrictions of a twenty to twenty-five percent permanent partial disability and work restriction of no lifting, pushing or pulling greater than thirty-five pounds was still accurate. (EX 6, p. 45). Dr. Vogel indicated that his opinion regarding Claimant's employability remained unchanged from his report issued February 25, 2000, meaning that Claimant had a twenty to twenty-five percent permanent impairment, should not lift, push, or pull greater than thirty five pounds, was currently disabled due to intractable pain, and when Claimant was able to control between eighty and ninety percent of his pain, he would be capable to undergoing a functional capacity evaluation to determine his capacity for gainful employment. (EX 6, p. 45; CX 11, p. 4).

B. Claimant's Testimony

Claimant testified that he could read and write only a few words, could not read the newspaper, and left school in the sixth grade. (Tr. 30-31). Regarding his former employment as an iron worker, Claimant testified that he was periodically laid off because the various iron-work jobs

only lasted only two to eight weeks, and when Claimant was able to perform shut-down work subsequent to a lay-off, those jobs would only last an additional six to eight weeks. (Tr. 32-33). Whenever Claimant was laid-off, he would return home to collect unemployment and wait to for a telephone call to return to work with the same or a different company. (Tr. 32-33). When Claimant began working for Employer in October 1996, his hourly rate of pay was eight dollars an hour, and on a typical day Claimant would work 6:00 a.m. to 6:00 p.m., and he worked no less than eighty-four hours per week. (Tr. 37).

At the hearing, Claimant described his current physical condition:

> A: I still can't hardly do nothing except get up a while and walk a while, and then you have to get down because you are hurting. My back and stuff is still hurting bad, and the leg still kills me. . . . [I have] bursitis in both hips.
>
> Q: Is there any activities that make it feel better or worse?
>
> A: No. I just live with it. Because I go down there and sometimes lay down there, because if you do anything, you have to lay down a couple of days or you are going to hurt yourself.
>
> Q: What about your back? What type of pain do you still have in your back?
>
> A: Still burning and everything still hurting bad in the back. Can't get up in the mornings, hardly.

(Tr. 45-47).

Apart for the pain in his back and bursitis, Claimant has radiating pain that extends down his legs. (Tr. 55). Currently, Claimant stated that he has to lay down three or four hours a day due to pain. (Tr. 50). He lives with his mother who cooks, does the majority of the household chores, and on a typical day Claimant testified that he would either watch television or visit friends and relatives. (Tr. 53-54). To attend the hearing Claimant had a friend drive the four and one-half hours to Metairie, Louisiana. (Tr. 63). Claimant was able to drive, however, and had a motorcycle which he rode occasionally. (Tr. 64-65).

Testimony of Michael Nebe & Vocational Records of FARA Healthcare Management

Mr. Nebe, a vocational rehabilitation counselor with FARA Healthcare Management, testified at trial regarding his contact with Claimant for vocational rehabilitation. Mr. Nebe testified that he met with Claimant many times and performed vocational testing on July 6, 1998, during which

Claimant filled out a vocational data sheet in his presence.[2] (Tr. 68-69). Based on the medical records of the treating physician, Dr. Vogel, the second opinion physician, Dr. Schumacher, and Mr. Nebe's vocational interview with Claimant, Mr. Nebe preformed a vocational assessment on August 7, 1998, determining that Claimant had transferable skills including, *inter alia*, understanding and following blueprints and written specifications, working to precise measurements, using arithmetic, operating heavy machinery, and following work orders. (EX 6, p. 20, 22). At that time, Dr. Vogel had issued a report indicating that Claimant had reached maximum medical improvement with permanent restrictions of no lifting, bending, pulling, or pushing greater than fifty pounds and no repetitive bending. *Id*. at 20. Subject to those restrictions, Dr. Vogel approved Claimant's return to his former position as a rigger. *Id*. Contrary to Dr. Vogel's work restrictions, Dr. Schumacher stated that Claimant was only capable of light duty employment. *Id*.

Based on Claimant's transferable skills, Mr. Nebe identified career alternatives such as a boat rigger, service mechanic, oiler, lube technician, boat outfitter, lawn sprinkler installer, bridge operator and forklift operator. (Tr. 71; EX 6, p. 22-23). Other entry level positions that fell between the light to medium level of exertion included: hot shot driver, parts delivery driver, parts clerk, inside sales person, van driver, rental car delivery driver, and porter/janitor. (Tr. 71; EX 6, p. 23). A labor market survey was postponed, however, until a decision was made concerning Claimant's need for an inter-body caged fusion. *Id*.

Claimant underwent surgery in February 1999, and Dr. Vogel indicated on June 1, 1999, that Claimant would not reach maximum medical improvement for another two years, and would then likely have a fifteen to twenty percent disability rating, would not likely be able to lift, push, or pull more than thirty-five pounds, and would not be able to do repetitive bending. (Tr. 72; CX 5, p. 56). Based on these restrictions, Mr. Nebe, in March of 2000, identified alternative employment for Claimant as: an alarm signal operator, a sedentary position that allowed claimant to sit, stand and take breaks in Monroe, Louisiana, a Pinkerton security guard in Shreveport, Louisiana, a monitor for the Salvation Army in Monroe, Louisiana; a lot attendant in Vicksburg, Mississippi; and a transport driver in Vicksburg, Mississippi. (Tr. 73-80; EX 6, p. 36-37). Mr. Nebe related that these jobs were consistent with Dr. Vogel's work restrictions. (Tr. 80).

Based on numerous telephone conversations with Claimant, Mr. Nebe stated that Claimant verbalized and communicated well, was a nice person, and Mr. Nebe did not think that Claimant's lack of education would be a major factor in securing employment. (Tr. 76). Rather, Mr. Nebe thought sales jobs would be a "knack" for Claimant. (Tr. 78). Mr. Nebe related that he was aware that telephone solicitors often had to read from a script and admitted that he did not discover whether

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[2] At the hearing, Claimant testified that he was illiterate, only able to read and write simple things, and that it was not his handwriting on the vocational data sheet. (Tr. 62-63; EX 11). Comparing the handwriting on the vocational data sheet to other examples of Claimant's handwriting in the record, I find that Claimant did not fill out the vocational data sheet. (CX 6, p. 25-27).

the telephone jobs he identified required their applicant to be able to read. (Tr. 103-04).

In May 2000, Mr. Nebe identified additional jobs. (EX 6, p. 39-40). One was a service advisor at Moffett Volkswagen in Bossier City, a job that entailed communication between mechanics and customers, and after consultation with the mechanic, the prospective employee would call the customer to negotiate a contract. (Tr. 74-75; EX 6, p. 39). Mr. Nebe also identified a position as a counter clerk for B&B Tuxedo in Shreveport which would require Claimant to write tickets, obtain information, and rent tuxedos. (Tr. 77; EX 6, p. 40). Other jobs were: an alarm dispatcher in Shreveport, Louisiana, a "make ready person" for Quail Creek Apartments in Shreveport, Louisiana. a telemarketer in Vicksburg, Mississippi, and a lot attendant in Vicksburg, Mississippi. (EX 6, p. 39-40).

On May 23, 2000, Mr. Nebe submitted several job descriptions to Dr. Schumacher for approval. (EX 6, p. 27). On June 16, 2000, Dr. Schumacher indicated that a position as an alarm signal operator, auto service writer, counter clerk, and telephone solicitor were appropriate vocational undertakings, but a position entitled "Apartment Make Ready" was not appropriate. *Id*. at 29-33. Dr. Schumacher also indicated, however, that Claimant's chronic pain may preclude Claimant form undertaking any job. (CX 3, p. 3). Nevertheless, Mr. Nebe testified that he relied on the restriction set by Dr. Vogel in identifying suitable employment in the spring and summer of 2000. (Tr. 94).

Likewise, Mr. Nebe did not exclude jobs based on Dr. Vogel's statement that Claimant "remains disabled for gainful employment secondary to intractable pain." (Tr. 120). Rather, in finding alternative employment, Mr. Nebe testified that he did not consider pain as a factor in identifying jobs because pain was a subjective concept. (Tr. 96). Mr. Nebe was cognizant of the fact that Claimant would probably experience pain so he tired to identify positions that would offer alternative periods of sitting and standing. (Tr. 96). Accepting Claimant's testimony that he must lay down for a few hours each day, Mr. Nebe stated that no potential employer would likely allow Claimant to lay down on the job. (Tr. 97).

On July 5, 2000, Mr, Nebe forwarded more job leads to Claimant including: route carrier for the News Star in Monroe, Louisiana, delivery diver in Monroe, Louisiana; monitor for the Salvation Army in Monroe, Louisiana; and a meter reader in Monroe, Louisiana. (Tr. 83; EX 6, p. 41-42).

On August 28, 2000, Mr. Nebe wrote to the functional capacity evaluator, Paul Procell, because he was concerned that the functional capacity evaluation was not an accurate reflection of Claimant's ability to work based on indications of inappropriate pain levels, inconsistent effort, positive Waddell signs and inappropriate responses during the testing. (EX 6, p. 34). Mr. Nebe thought that Claimant would be capable of at least light duty work after weighing the sub-maximal effort. (Tr. 84; EX 6, p. 34). Also, Mr. Nebe questioned Mr. Procell's recommendation for pain management because Mr. Nebe did not consider Claimant a motivated individual. (EX 6, p. 34). Finally Mr. Nebe stated that Mr. Procell should have allowed him to speak prior to the test so that Mr. Nebe could provide a "more clear picture" of Claimant. *Id*. At trial Mr. Nebe confessed that

he had no indication from Dr. Vogel that Clamant was eighty to ninety percent pain free and that a functional capacity evaluation was appropriate - some six months before Dr. Vogel forecasted maximum medical improvement - other than the fact that Dr. Vogel issued the prescription to perform the evaluation. (Tr. 88-89).

Nonetheless, Mr. Nebe stated that all of the jobs he had previously identified fell within the restrictions set by the functional capacity evaluation. (Tr. 85). Of all the jobs Mr. Nebe sent to Claimant or his attorney, his records reflected that Claimant only applied for the job at B&B Tuxedo in Shreveport, Louisiana, but, although he was interviewed for the position, he was not selected. (Tr. 86-88). Claimant did not conduct what Mr. Nebe would consider a diligent job search. (Tr. 88). Mr. Nebe did not know if any of the positions he identified were available after the functional capacity evaluation was performed. (Tr. 89-90).

At hearing, Mr. Nebe stated that he attempted to find work in Delhi, Louisiana, Claimant's residence, but was unsuccessful. (Tr. 98). Mr. Nebe also indicated that he was unaware of how far Shreveport and Bossier City was from Delhi, and when he became cognizant of the fact that the two locales were not close to each other he began looking a cities closer to where Claimant resided. (Tr. 101).

On October 9, 2001, Mr. Nebe wrote to Dr. Vogel to ascertain whether Claimant's restrictions of a twenty to twenty-five percent permanent partial disability and work restriction of no lifting, pushing or pulling greater than thirty-five pounds was still accurate. (EX 6, p. 45). Dr. Vogel indicated that his opinion regarding Claimant's employability remained unchanged from his report issued February 25, 2000. *Id*.

In preparing for hearing, Mr. Nebe identified a few jobs available from Louisiana Job Services in Monroe. (Tr. 118). One was a sales position - a job that entailed twenty hours a week contacting people from home to sell products. (Tr. 118). Another was an auto service sales person in Monroe that required knowledge of automobiles and customer service skills. (Tr. 118). A third position was as a receptionist/dispatcher who would occasionally transport passengers around the Ouachita Parish area. (Tr. 199). Mr. Nebe also identified jobs as a donor recruiter who would be required to speak publically and give general presentations, and a retail merchandiser for Hallmark, a job which required traveling around the Bastrop area. (Tr. 119). Mr. Nebe did not know whether the position as a dispatcher was a sedentary position, or the particular requirements of the job. (Tr. 120). None of these jobs were approved by Claimant's physicians, the availability of the jobs were not ascertained, and Mr. Nebe did not speak to any of those employers to determine whether the jobs fit Claimant's particular work restrictions. (Tr. 126-27).

C. Exhibits

(1) Medical Records of Dr. K. E. Vogel

On October 14, 1997, Claimant was admitted to Memorial Medical Center where Dr. Vogel, a neurological surgeon, performed a micro-surgical laminectomy at L4-5 and L5-S1 with left medial branch neurotomy at L3-4, L4-5 and L5-S1. (CX 5, p. 28-30). Three months post-operation, Dr. Vogel opined that Claimant had incurred a permanent impairment rating of ten to fifteen percent and would be unable to lift, push, or pull greater than fifty pounds or do repetitive bending. (CX 5, p. 38). Maximum medical improvement was assigned as one-year post-operation. *Id*. Based on Claimant condition on July 6, 1998, however, Dr. Vogel recommended further surgery to perform a posterior lumbar inter-body caged fusion. *Id*. at 39.

On February 10, 1999, Claimant was admitted to Memorial Medical Center to undergo the recommended procedure. (CX 5, p. 41). Claimant's final diagnosis was a herniated lumbar disc, symptomatic lumbar degenerative disc disease, and lumbar instability. *Id*. Dr. Vogel performed a posterior inter-body cage fusion at L4-5, L5-S1, a bilateral micro-surgical discetomy at L4-5, L5-S1, and bilateral medial branch neurotomy at L3-4, L4-5, and L5-S1. *Id*. at 42. On June 1, 1999, Dr. Vogel opined that Claimant would have incurred a fifteen to twenty percent permanent impairment and would be unable to lift, push, or pull greater than thirty-five pounds or bend repetitively. *Id*. at 56. Maximum medical improvement would be reached two years post-operatively. *Id*. at 57. On November 16, 1999, Dr. Vogel reiterated that Claimant was currently disabled from undertaking any employment and would reach maximum medical improvement two years post-operation. *Id*. at 69.

On February 25, 2000, Dr. Vogel responded to requests from Mr. Nebe stating that Claimant would reach maximum medical improvement two years post-operation and that Claimant was disabled due to intractable pain. (CX 11, p. 4). Dr. Vogel further stated that Claimant had incurred a twenty to twenty-five percent permanent disability based on his lumbar condition and when Claimant was able to control between eighty and ninety percent of his pain, he would be capable of undergoing a functional capacity evaluation to determine his ability for gainful employment. *Id*. On August 9, 2001, Dr. Vogel indicated that his opinion remained unchanged, but he issued a prescription for Claimant to undergo a functional capacity evaluation at the request of Mr. Nebe. (CX 11, p. 1; CX 12, p. 1).

(2) Medical records of Dr. John F. Schumacher

On September 3, 1997, Dr. Schumacher issued a second opinion and recommended that Claimant undergo a L4-5 left discetomy without fusion. (CX 2, p. 2). On May 18, 1998, Dr. Schumacher re-evaluated Claimant in relation to Dr. Vogel's recommendation for a second surgery to preform a posterior lumbar inter-body caged fusion at L3-4 for a "collapsed disc." *Id*. Dr. Schumacher noted definite exaggeration of symptoms as Claimant cried out with even a light touch of the back. *Id*. at 3. His impression after reviewing diagnostic studies performed in March and April of 1998, was that Claimant was status post-operative L4-5 and L5-S1 discetomy with residual symptoms, and that Claimant has symptom magnification, but there was no evidence of recurrent disc herniation. *Id*. Nonetheless, Dr. Schumacher recommended a lumbar myelogram and a post-myelogram CT scan. *Id*. If the further studies fail to indicate any problems than Dr. Schumacher

would impose work restrictions limiting Claimant to sedentary or light work with no lifting over thirty pounds. *Id*. at 4. On July 7, 1998, a radiologist found evidence of a ruptured lumbar disc and Dr. Schumacher recommended decompression discetomy without fusion. *Id*. at 5-6.

On June 16, 2000, Dr. Schumacher noted that Claimant underwent a caged fusion in February 1999. (CX 3, p. 1). Despite the surgery, Claimant stated that his pain, although initially diminished, had returned. *Id*. Dr. Schumacher noted that both Claimant and Dr. Vogel had indicated that Claimant was currently disabled due to intractable pain. *Id*. Dr. Schumacher's impression was that Claimant suffered from status post-operative lumbar laminectomy with inter-body caged fusion and a failed back syndrome. *Id*. at 2. Dr. Schumacher further opined that Claimant was disabled for any but the most sedentary of activities and may not even be able to perform those due to chronic pain and lack of communication skills. *Id*. Overall, Dr. Schumacher stated that he is likely permanently and totally disabled for any and all occupations, but from a physical standpoint, Claimant was capable of activities requiring repetitive lifting, bending, pulling, and pushing of weights less than fifteen pounds, noting again that this restriction did not take into account Claimant's reports of chronic pain which would prohibit Claimant from performing any work. *Id*. Dr. Schumacher refused to indicate a date for maximum medical improvement as it take at least a year for a fusion to become solid. *Id*. at 3. Of the available jobs Mr. Nebe forwarded to him, Dr. Schumacher indicated that none may be appropriate due to Claimant's chronic pain. *Id*.

(3) Section 8(i) Settlement Agreement

On May 11, 2000, Claimant and Employer entered into a Section 8(i) settlement agreement. (EX 7, p. 1). The parties stipulated to the fact of injury and the liability of Employer for both indemnity and medical benefits. *Id*. at 1-2. The settlement did not affect Claimant's entitlement to weekly compensation benefits. *Id*. at 4. Employer/Carrier and Claimant agreed to settle entitlement to future medical benefits for $80,861.71, the amount of Employer/Carrier's lien in related third-party litigation. *Id*. at 5. The parties also stipulated, however, that Employer/Carrier had not provided any medical benefits for Claimant's February 11, 1999, posterior inter-body caged fusion at L4-5, L5-S1 performed by Dr. Vogel. *Id*. Clamant expressly retained the right to seek reimbursement for medical costs incurred for that surgery. *Id*. Furthermore, the parties agreed that Claimant's attorney would waive any claim for fees for services rendered on behalf of Claimant in procuring future medical benefits under the Act as his fees were taken out of the third party settlement. *Id*. at 8.

(4) Functional Capacity Evaluation

On August 17, 2000, Claimant underwent a functional capacity evaluation with Mr. Paul Procell. (EX 10). Claimant reported constant pain in his lumbar region with radicular pain extending down his left foot. *Id*. at 2. Claimant also reported paresthesia in the left lower extremity. *Id*. Claimant's self-described his limitations as being unable to sit or stand for more than one hour before needing to alternate positions. *Id*. On a zero to ten scale Claimant rated his pain score between six and eight. *Id*.

Mr. Procell related that Claimant provided maximum voluntary effort and borderline appropriate pain behavior during the exam. (EX 10, p. 3). Claimant self-limited his performance due to increased pain. *Id*. Nonetheless, Claimant did not meet objective criteria for symptom exaggeration. *Id*. During the exam, Claimant demonstrated an ability to lift twenty-one pounds occasionally from floor to shoulder and the ability to carry sixteen pounds in a bilateral frontal carry. *Id*. at 4. Based on the results of the examination, Mr. Procell opined that Claimant was capable of light duty work that did not require continuous standing or walking greater than one hour. *Id*.

(5) Deposition of Janice Craig

The deposition of Ms. Craig, a corporate representative of Employer who owns forty-nine percent of the company, was noticed by Claimant on February 27, 2002. (CX 10, p. 1, 5). Ms. Craig was knowledgeable about the duties, rates of pay, and hours worked by employees such as Claimant. *Id*. at 7. Mr. Craig labeled Claimant an average employee although she had no objective basis for making such a determination. *Id*. at 66-67.

In regards to similarly situated employees for making a Section 10(b) calculation of average weekly wage, Ms. Craig stated that, although employees might be under the same classification, and make the same hourly wages, individual workers were prone to work different amounts of hours during the year because they have different types of jobs and different hours depending on need and economic conditions. (CX 10, p. 9-10). In finding a similarly situated employee, Ms. Craig stated that Claimant was only with the company a few months, but, she had other employees that were under the same classification, paid the same hourly rate, and were employees whom the personnel director deemed the same caliber of employee as Claimant. *Id*. at 10-11. The employee wage records Ms. Craig produced for the subpoena, however, were indicative of workers who were employed the most number of hours during the year, not workers whose hours would best reflect the number of work hours available for Claimant during the year. *Id*. at 14. Some employees were merely more motivated than Claimant to work, and because of that fact, they were allowed to work more hours. *Id*. at 46. Nonetheless, Ms. Caig produced the wage records of two employees, James May, Jr. and Eric Tiser, that she deemed most similarly situated to Claimant's position and amount of yearly work available to him as a average rigger earning eight dollars an hour. *Id*. at 22-28.

For the fiscal year 1997, Mr. Craig estimated that Employer had between 300 and 400 riggers on the payroll. (CX 10, p. 51). Mr. Craig related that Claimant began work at eight dollars an hour with his first pay period ending November 3, 1996, and his last ending on February 16, 1997. *Id*. at 17. Employer's pay period ran weekly, from Monday to Sunday, and Claimant was employed a full week when he received his first pay-check on November 3, 1996. *Id*. at 17-18. At the time of the deposition, Employer was still paying an average of eight dollars an hour to each rigger. *Id*. at 52.

A rigger for Employer had various duties in assisting welders and construction crews. (CX 10, p. 18). Sometimes they would load and unload boats and other times they would assist on the platform. *Id*. Claimant's duties consisted mainly of assisting welders and his work locations differed

depending on where Employer obtained a job for a customer. *Id*. at 18-19. At the time of his injury, Claimant was working a construction job at Freeport Main Pass 299. *Id*. at 19. During Claimant's first full week of work he was employed for eighty-six hours, and the next week he worked for ninety-four hours. *Id*. at 30-31. For the first forty hours, Claimant made eight dollars an hour and any time after that he made twelve dollars an hour. *Id*. at 31. For Claimant's nine checks, he earned 314 regular hours and 235 overtime hours. *Id*. at 32. During the year preceding and the year prior to Claimant's injury, Ms. Craig stated that there were periods of non-work for riggers earning eight dollars an hour. *Id*. at 38. Employer also provided fifty percent of insurance premiums, if the employee elected a health plan, amounting to about one-hundred dollars a month for a single male, and provided meals while the employees were working offshore. *Id*. at 64.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends Employer is liable for all amounts expended by Claimant in excess of the fee schedule. Specifically, Claimant argues that he need only prove that treatment was necessary in light of Employer's refusal to authorize the surgery. Section7(d), the Act provides that after an employer fails to provide necessary treatment, the employee may recover "any amount expended" for the cost of that treatment. Claimant also contends that his average weekly wages should be calculated under Section 10(b), based off James May, a similar situated employee, who earned $21,320.00 in thirty-seven weeks of work. Reasoning that thirty-seven weeks is substantially the whole year and that Mr. May was a five-a-day worker, Claimant asserts that his average weekly wage is $575.00. Additionally, under Section 10(c), Claimant alleges that he earned $5,332.00 in the nine weeks he was worked for Employer, yielding an average weekly wage of $592.00. Claimant's further asserted that his actual earnings for the year prior to his injury should not be used because, while Claimant earned $16,575.00, there is no indication over what period of time this amount of money was earned. Finally, Claimant contends that he cannot return to his former job, thus, establishing a *prima facie* case of disability. Finally, Clamant argues that Employer failed to show suitable alternative employment

Employer contends that the issue of medical reimbursement was not raised at the informal hearing on April 10, 2001. Also, Employer contends that the scheme set forth in the Code of Federal Regulations for determining whether a disputed medical bill "exceeds that customary charges" provides that a physician, not the patient can request the district director to make a finding on the reasonableness of the physician's charge. Thus, because the patient is contending that Employer should pay the physicians charges, Employer argues that the issue of medical costs is not properly before this Court. Additionally, under Section 7(b) of the Act, Employer asserts that the Secretary is the proper party for determining the reasonableness of medical fees and this Court should remand the issue to the Office of Workers' Compensation Programs as the District Director has sole discretion over the management of the medical aspects of this claim. Alternatively, under *Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1175 (1991), Employer argues that the health care provider bears the burden of proving that medical fees do not exceed that customarily charged in the

community and that no evidence was submitted in this case to meet that burden.

Employer also contends that Claimant's average weekly wage should be calculated under Section 10(c) of the Act. Specifically, Claimant was employed by at least five different companies in the year preceding his accident and his prior employment was intermittent and discontinuous. Thus based off Claimant's W-2 forms from the year prior, his average weekly wage should be $304.81, or alternatively, averaging in all nine weeks Claimant worked for Employer, Claimant's average weekly wage should be $333.61. Finally, Employer contends that Dr. Vogel released Claimant to undergo a functional capacity evaluation because Claimant was eighty to ninety percent pain free and through it vocational counselor, Employer established suitable alternative employment between $5.00 and $5.50 per hour.[3]

B. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire*

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[3] By order dated April 23, 2002, I ordered the Office of the Solicitor to submit a brief on:

> 1. Whether an employer or claimant shall be held liable for medical fees in excess of the schedule maintained by OWCP when the employer wrongfully refuses reasonable and necessary medical treatment and the claimant incurs a personal obligation to pay for those medical services?
>
> 2. Whether the Office of Administrative Law Judges has jurisdiction over the above issue or whether the issue should be remanded to the Director to determine whether the medical charges incurred by Claimant constitute a reasonable fee
>
> 3. Whether 20 C.F.R. § 702.413 (2001), governing the administration of the Longshore Act, incorporates the medical fee schedule provisions of the Federal Employees Compensation Act (FECA) at 20 C.F.R. § 10.805 *et seq*.

No briefs were submitted from the Office of the Solicitor.

United Stevedores, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Under Section 10(a) the average weekly wage is calculated by dividing the total earnings of the claimant during the preceding fifty-two weeks by the number of days actually worked, then multiplying that number by 300 for a six day worker, and by 260 for a five day worker. 33 U.S.C. § 910(a) (2001); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998). Jurisprudence interpreting Section 10(a) establishes the meaning of "substantially the whole year." *See Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148, 155 (1979)(finding that 33 weeks was not substantially the whole year); *Stand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, 850 (1979)(finding that 36 weeks was not substantially the whole year); *Mallory v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 516, 519 (1999)(ALJ)(finding that a person who works less than half the preceding year cannot be said to have worked "substantially the whole year"). *Cf. Eleaver v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977)(finding 28 weeks of employment sufficient because claimant's work was regular and continuous); *Amon v. Ceres Marine Terminal*, 2001-LHC-0295, n.4; 2001 WL 1451099 *4 (DOL Ben. Rev. Bd. 2001)(ALJ)(indicating that 28.43 weeks was substantially the whole year considering claimant's work was "continuous and uninterrupted"). Section 10(a) should be applied even though virtually no one in the country works either 260 or 300 day per year and any overcompensation that results was approved by Congress for administrative convenience. *Matulic*, 154 F.3d at 1057. (finding that crediting an employee with eighteen percent more days than he actually worked was within the range of administrative convenience approved by Congress). *See also Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343 (9th Cir. 1982) (finding that crediting an employee with on-third more days than he actually worked was beyond the range of administrative convenience set by Congress).

Here, Claimant only worked for Employer from Monday, October 28, 1996, to February 12, 1997, a period of 16.43 weeks, and this time frame cannot be characterized as substantially the whole of the year. (EX 1, p. 1; EX 9, p. 1-2). Prior to working for Employer, Claimant testified that he was an iron worker, earning up to fifteen dollars an hour in work that was intermittent and sporadic and done for numerous employers. (TR 31-32; EX 6, p. 21; EX 8, p. 6-13). No clear indication exists in the record as to how long Claimant worked during the year prior to his accident although Claimant stated that he was employed less than six months during 1996 as an iron worker. (Tr. 33). Accordingly, Claimant's work was not regular and continuous, and Claimant's job as an iron worker, earning up to fifteen dollars an hour cannot be construed as "the same employment" as a rigger making eight dollars an hour. Therefore, I find that a Section 10(a) calculation is inappropriate.

(2) Section 10(b)

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and

directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153.

Here, Employer submitted the wage numerous wage records of other riggers, but only indicated that two were similarly situated to Claimant, meaning that they were considered average riggers by the personnel director, would most likely work the same number of hours per year, and earned the same rate of pay. (CX 10, p. 22-28).

The wage records of the first similarly situated employee, James May, Jr., reflect that his first pay period ended on March 17, 1996, and the last pay period ended on January 28, 1997. Because Employer has a pay period that extends from Monday to Sunday, Mr. May would have began work on Monday, March 11, 1996. However, I note that Mr. May only worked six hours during this pay period, and due to the possibility that he was hired mid-week, I find it appropriate to exclude his first pay period and only consider his records from March 18, 1996 to January 28, 1997,[4] a time period that spans 45.29 weeks. During this time period Mr. May earned thirty-three checks, totaling $17,682.00, for an average weekly wage of $390.35.[5]

The wage records of the second similarly situated employee, Eric Tiser indicates that the majority of his earnings were pre-set, regularly earning $438.24 per week for "1.00" unit hours of work. Because Claimant worked off shore and was paid different rates depending on how much overtime he worked, I do not find that an employee whose majority earnings are not reflective of any overtime or regular hourly rates is similarly situated and find it appropriate to exclude his records for

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[4] Inexplicably, January 28, 1997 is a Tuesday, while Janice Craig, Employer's representative, stated that the pay period ends on Sunday, which would have been January 26, 1997.

[5] In making this determination, I note that Mr. May worked a total of 1,795 hours over 45.29 weeks, for an average of 39.63 hours per week. I also find that Mr. May's work was regular and continuous and that the 45.29 weeks Mr. May worked was "substantially the whole year." Based on the fact that riggers worked fourteen days on the platform and had the next seven days off, and the overall average hours Mr. May worked per week, I find that he is a five a day employee under the meaning of Section 10(a). Because the actual number of days Mr. May worked is not readily ascertainable, I note that his average hourly wage is $9.85 per hour. ($17,682.00 ÷ 1,795 hours). Based on an average work week of 39.63 hours, Mr . May's average daily wage was $78.07. (39.63 hours ÷ 5 days = 7.93 hours per day. Multiplied by $9.85 per hour = $78.07 per day). Multiplying his average daily wage by 260 provides average annual earnings of $20,298.20, which divided by 52 equals $390.35 per week.

a Section 10(b) analysis.

Accordingly, I find that Mr. May's rate of pay, his classification as an "average employee," and the amount of work he undertook, most closely approximates that of Claimant. Therefore, I find that Claimant's average weekly wage is $390.35 per week, with a corresponding compensation rate of $260.23 per week.

C. Nature and Extent and Date of Maximum Medical Improvement.

Claimant seeks continuing temporary total disability benefits from February 12, 1997. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2001). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). Here, Claimant's treating physician stated that Claimant reached maximum medical improvement two-years after is second back surgery on February 11, 1999. (CX 5, p. 57). Accordingly, I find that Claimant reached maximum medical improvement on February 12, 2001.

(1) Nature of Claimant's Injury

In October 1997, Claimant underwent a micro-surgical laminectomy at L4-5 and L5-S1 with left medial branch neurotomy at L3-4, L4-5 and L5-S1. (CX 5, p. 28-30). Following a collapsed disc, Claimant underwent a second surgery in February 1999, in which Dr. Vogel performed a posterior inter-body cage fusion at L4-5, L5-S1, a bilateral micro-surgical discetomy at L4-5, L5-S1, and bilateral medial branch neurotomy at L3-4, L4-5, and L5-S1. *Id*. at 42.

On June 16, 2000, Dr. Schumacher's impression was that Claimant suffered from status post-operative lumbar laminectomy with inter-body caged fusion, a failed back syndrome, and suffered from chronic pain. (CX 3, p. 2). Claimant's functional capacity evaluator also noted chronic pain and paresthesia. (EX 10, p. 2).

(2) Extent of Claimant's Disability

Claimant's treating physician, Dr. Vogel, stated on June 1, 1999, that Claimant suffered a fifteen to twenty percent permanent impairment and would be unable to lift, push, or pull greater than thirty-five pounds or bend repetitively. (CX 5, p. 56). On February 25, 2000, however, Dr. Vogel indicated that Claimant was disabled due to intractable pain. (CX 11, p. 4). Additionally, Dr. Vogel increased Claimant's permanent impairment rating as high as twenty to twenty-five percent. *Id*. Dr. Vogel further stated that when Claimant was able to control between eighty and ninety percent of his pain, he would be capable of undergoing a functional capacity evaluation to determine his ability for gainful employment. *Id*.

On June 16, 2000, Dr. Schumacher noted that both Claimant and Dr. Vogel indicated that Claimant was currently disabled due to intractable pain. (CX 3, p. 1). Dr. Schumacher further opined that Claimant was disabled for any but the most sedentary of activities and may not even be able to perform those due to chronic pain and lack of communication skills. *Id*. Overall, Dr. Schumacher stated that he is likely permanently and totally disabled for any and all occupations, but from a physical standpoint, Claimant was capable of activities requiring repetitive lifting, bending, pulling, and pushing of weights less than fifteen pounds, noting again that this restriction did not take into account Claimant's reports of chronic pain which would prohibit Claimant from performing any work. *Id*.

On August 17, 2000, Claimant underwent a functional capacity evaluation with Mr. Paul Procell. (EX 10). On a zero to ten scale Claimant rated his pain score between six and eight. *Id*. at 2. Mr. Procell related that Claimant provided maximum voluntary effort and borderline appropriate pain behavior during the exam. *Id*. at 3. Although Claimant self-limited his performance due to increased pain, he did not meet objective criteria for symptom exaggeration. *Id*. During the exam, Claimant demonstrated an ability to lift twenty-one pounds occasionally from floor to shoulder and the ability to carry sixteen pounds in a bilateral frontal carry. *Id*. at 4. Based on the results of the examination, Mr. Procell opined that Claimant was capable of light duty work that did not require continuous standing and walking activities greater than one hour. *Id*.

Claimant stated that he had great difficulty in performing any activity because of his pain. (Tr. 45-47). Apart from lumbar pain and bursitis in his hips, Claimant stated that he had radiating pain from his back that extends down his legs. (Tr. 55). Currently, Claimant stated that he has to lay down three or four hours a day due to pain. (Tr. 50). He lives with his mother who cooks, does the majority of the household chores, and on a typical day Claimant testified that he would either watch television or visit friends and relatives. (Tr. 53-54).

Employer argues that because Dr. Vogel referred Claimant to have a functional capacity exam

on August 17, 2000, he was of the opinion that Claimant was eighty to ninety percent pain free. Employer also related that the fact Claimant occasionally rode a motorcycle was evidence that he was not in a great deal of pain. Dr. Vogel, however, never stated that Claimant was eighty to ninety percent pain free and there is no indication that Dr. Vogel examined Claimant between February and August 2000 that could cause him to change his opinion. I do not find that the act of occasionally riding a motorcycle means that Claimant is eighty to ninety percent free of pain. Accordingly, I find that the evidence preponderates that Claimant has a twenty to twenty-five percent permanent partial impairment, with an inability to lift, push, or pull greater than fifteen ponds and an inability to bend repetitively. I also find that Claimant suffers from intractable pain which renders him permanently and totally disabled until such time as he can control eighty to ninety percent of his pain.

D. Reimbursement for Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). The Act contains different provisions for reimbursing the injured employee for incurred medical expenses and for determining the amount payable for treatment between the employer/carrier and the medical provider.

(1) Reimbursing Medical Expenses Incurred after Refusal to Authorize Required Treatment

The Act provides:

> (1) An employee shall not be entitled to recover *any amount expended* by him for medical or other treatment or services unless--
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.
> . . . .
> (3) The Secretary may, upon application by a party in interest, make an award for the *reasonable value* of such medical or surgical treatment so obtained by the employee.

33 U.S.C. §§ 907(d)(1),(3) (2001) (emphasis added).

In *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 1301 (5th Cir. 1992), the Fifth Circuit held that when an injured employee is awarded reimbursement for out-of-pocket medical expenses, that award is treated as an award for "compensation" under the Act for the purposes of accelerated

enforcement of a final award. The court reasoned that the "financial burden that medical costs impose on an injured employee is just as debilitating as the loss of income resulting from an employee's inability to work." *Id*. at 1302. Considering the Act's remedial purpose and that it "must be liberally construed in conformance with its purpose in a way that avoids harsh and incongruous results," the court found that the injured employee should receive benefits promptly rather than having to suffer while those benefits were appealed. *Id*. (Citing, *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 316-17, 103 S. Ct. 634, 646, 74 L. Ed. 2d 465 (1983)).

In *Hunt v. Director, OWCP*, 999 F.2d 419, 421-22 (9th Cir. 1993), the Ninth Circuit held that medical providers could recoup pre-judgment interest on outstanding treatment balances from the employer/carrier when an injured employee incurred an obligation for reasonable and necessary medical treatment. The court reasoned that there was no statutory impediment to the Director's "view that the 'reasonable value' of medical services rendered includes interest on sums that are overdue." *Id*. at 422 (Citing 33 U.S.C. § 907(d)(3)). Not allowing recovery of pre-judgment interest would likely subject injured employees to "far more persistent and troublesome collection efforts by medical providers and in some cases [the worker] might suffer serious economic consequences." *Hunt*, 999 F.2d at 422. "The remedial purposes of the Act would be undermined if employers were allowed to withhold medical payments - no less than disability payments - interest free." *Id*.

Thus, as between the employer/carrier and the injured worker, "any amount expended" by the worker, after the requirements of Section 7(d) are met, are recoverable up to the "reasonable value" of those services. Following *Hunt*, the "reasonable value" of medical services includes pre-judgment interest. Additionally, under *Lazarus*, the sums expended by the injured worker are treated as compensation for the purposes of accelerated enforcement.

(2) Limiting Fees Chargeable to Employer/Carrier by Health Care Providers

Under Section 7(g) of the Act, medical charges "shall be limited to such charges as prevail in the community for such treatment, and shall be subject to regulation by the Secretary." 33 U.S.C. § 907(g) (2001). Additionally, the "Secretary shall issue regulations limiting the nature and extent of medical expenses chargeable against the employer without authorization by the employer or the Secretary." *Id*. Under the Code of Federal Regulations:

> All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community . . . and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 CFR 10.411) to the extent appropriate, and where not appropriate, may use other state or federal fee schedules.

20 C.F.R. § 702.413 (2001).[6]

The Code of Federal Regulations also provide a detailed procedures whereby medical providers can contest the maximum allowable charge for services under the schedule maintained by OWCP. 20 C.F.R. §§ 702.414 - 417 (2001). Additionally, those provisions allow for any interested party to complain to the Director about any fee that exceeds the prevailing community charge. 20 C.F.R. § 702.414(a) (2001). When a dispute arises over the excessiveness of a charge, and the Director agrees that the charge is excessive, the Code only speaks in terms of "readjustment" of the fee charged, not in terms of reimbursement of overpaid expenses. 20 C.F.R. § 702.417 (2001).

In *Petroleum Helicopters, Inc. v. Garrett*, 23 F.3d 107, 110 (5th Cir. 1994), the Fifth Circuit held that an employer had no claim for reimbursement against a health care provider when the employer had paid for medical treatment that was adjudicated as excessive. The court determined that the Act did not provide any "express cause of action for an employer to recover overpayments from a medical care provider." *Id*. at 108. The employer had no implied remedy under Section 21(d) because that provision only applied to a beneficiary of a compensation order enforcing that order against the employer or its agents. *Id*. Rather, the Act specifically addressed when had how employers could obtain reimbursement for payments already made by providing for a set-off against future compensation. *Id*. at 109 (Citing 33 U.S.C. §§ 908(j), 914(j), 922). Just as an employer does not have a separate cause of action to enforce a reimbursement order against an employee when no future compensation benefits are due, "the employer is foreclosed from bringing an action for reimbursement for medical care providers as well" because Congress had only provided for prospective disqualification to receive fees in cases of fraud, and here, where there was no fraud, Congress would likely reject a claim for reimbursement. *Id*. at 110 (Citing H.R.Rep. no. 570, 98th Cong., 2d Sess. pt. I at 14 (1983) *reprinted in*, 1984 U.S.C.C.A.N. 2734, 2747).

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[6] Regretfully, 20 C.F.R. § 10.411 (2001) has nothing to do with Medical Fee Schedules. Under 20 C.F.R. §§ 10.805 - 10.813 (2001), of the Code of Federal Regulations, dealing with the Federal Employees Compensation Act, there are rules governing the medical fee schedule and how payments for services and supplies are calculated. Specifically, the rules provide for the responsibility of the claimant when OWCP reduces the fee charged by the medical service provider:

> A provider whose fee for services is partially paid by OWCP as the result of the application of the schedule of maximum allowable charges and who collects or attempts to collect from the employee, either directly or through a collection agent, any amount in excess of the charge allowed by OWCP, and who does not cease such action or make appropriate refund to the employee within 60 days of the date of the decision of OWCP, shall be subject to the exclusion procedures provided by § 10.815(h).

20 C.F.R. § 10.813(b) (2001).

Employer's inability to seek reimbursement under *Garrett* may explain Employer's refusal to pay for the treatment. In this case, however, Claimant incurred a personal obligation to pay for his medical treatment after Employer/Carrier unreasonably refused to authorize his second back surgery, thus, this case is beyond the scope of § 702.417 and rules governing the relationship between an employer/carrier and a health care provider.

(3) Employer Must Reimburse Claimant for the Actual Amount of Medical Costs Incurred in Obtaining Required Treatment

The entitlement of an employer or carrier to avail themselves of the lower medical fees as established by the Secretary, must be contrasted withe the relative inability of the injured worker to negotiate a lower fee for services. I can see no legitimate reason to follow Employer's argument that it can only be required to reimburse Claimant for the amount allowed for his medical treatment in the schedule, which would force the injured worker to suffer an economic disability in having to pay the difference in the fees charged between the schedule and the total cost of the contract entered into between Claimant and the health care provider. As the court in *Lazarus* determined, shouldering the financial burden of medical costs on the claimant is just as debilitating as the loss of income resulting from the employee's inability to work. Following *Hunt*, the District Director already has authority to force employers/carriers to pay pre-judgment on outstanding balances an amount that is calculated in to the "reasonable value" of those services.

This, of course, is not a license for abuse of process. A claimant should not willfully be allowed to enter into a contract providing for exorbitant fees accumulating interest at high rates and then force his employer to pay the bill whenever the employer contests treatment that is found to be reasonable and necessary. An entitlement to medical care does not necessarily mean entitlement to the most expensive care available. Such, however, is not the situation here. In this case, there is no proof of how much less Employer/Carrier would have to pay under the schedule. The higher fees charged in this case, if any, are a direct result of Employer's refusal to act in a timely fashion. The fact that Employer/Carrier may be precluded from asserting a claim for reimbursement against the medical provider under *Garrett* is irrelevant to the issue of whether Employer must pay for the medical expenses Claimant incurred. In keeping with the liberal interpretation of the Act in favor of the injured worker, the Employer should not be able to complain that the cost of medical services and supplies are higher as a result of its own actions. Accordingly, I find that Employer must reimburse Claimant all submitted medical expenses stemming from his July 11, 1999 surgery with Dr. Vogel and Employer is liable for all accrued interest.[7]

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[7] "Active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors." *Weikert v. Universal Marine Service Corp.*, BRB No. 01-552 (March 21, 2002) (Citing 33 U.S.C. § 907(b), (c); 20 C.F.R. § 702.401 *st seq.*). In *Weikert*, the Board stated:

> Disputes over whether authorization for treatment was requested by the claimant, whether the employer refused the request for treatment, whether the treatment

F. Conclusion

Claimant's average weekly wage is calculated under Section 10(b) of the Act, based on a similarly situated employee who worked in the same employment for substantially the whole year preceding Claimant's injury. Based off the records of that employee, Claimant's average weekly wage is $390.35. Claimant reached maximum medical improvement on February 12, 2001, and established that he was permanently totally disabled secondary to intractable pain following a second lumbar surgery with an inter-body caged fusion and a failed back syndrome. The total amount Claimant expended for medical treatment, and the total obligation Claimant incurred in obtaining necessary medical treatment, including accrued interest, was reasonable under Section 7(d)(3) and Employer must pay/reimburse Claimant for the total charge incurred.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorney Fees

> obtained was reasonable and necessary, or whether a physician's report was filed in a timely manner, are all factual matters within the administrative law judge's authority to resolve.

Weikert, BRB No. 01-552 (March 21, 2002)(slip op. at 4).

Here, the parties stipulated that the treatment was reasonable and necessary, that Claimant requested authorization and Employer refused to pay for the treatment. The administrative law judge, however, has authority to make determinations regarding payment of medical expenses under Section 7(d) of the Act. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989). Accordingly a remand to the District Director, who has authority under Section 7(b) of the Act, is not appropriate.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from February 12, 1997 to February 11, 2001, based on an average weekly wage of $390.35 per week and a corresponding compensation rate of $260.23.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the act based on an average weekly wage of $390.35 per week and a corresponding compensation rate of $260.23.

3. Employer shall be entitled to a credit for all compensation paid to Claimant after February 12, 1997.

4. Employer shall reimburse Claimant for all medical expenses incurred as a result of his February 11, 1999 lumbar surgery, and shall pay for all outstanding medical bills related to that surgery, including the bill from diagnostic Management Affiliates for the surgery totaling $56,920.78, plus accrued interest.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits as well as interest on the sum Claimant expended for obtaining medical treatment in relation to his February 11, 1999 lumbar surgery. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge